

UNCLASSIFIED

TELEGRAM

June 21, 2001

To: SECSTATE WASHDC - ROUTINE

Action: OES

From: USMISSION USUN N Y (USUN N Y 1468 - ROUTINE)

TAGS: PHSA, SENV, UNGA

Captions: None

Subject: UNCLOS - 11TH STATES PARTIES MEETING

Ref: None

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1. The United States attended the Eleventh Meeting of States Parties to the UN Convention on the Law of the Sea (UNCLOS) as an observer from May 14-18 in New York. The Meeting reviewed the annual report of the International Tribunal on the Law of the Sea, the report of the external auditors for the financial year 1999, a report from the International Seabed Authority, and a report from the Chairman of the Commission on the Limits of the Continental Shelf. The meeting engaged in a debate on the meaning of Article 319 of the Law of the Sea Convention and addressed the pending dilemma faced by States in meeting a Convention requirement to submit the coordinates of the outer limits of their continental shelf to the Commission on the Limits of the Continental Shelf. The meeting was chaired by Ambassador Christian Marquiere of Chile. U.S. statements are in Paragraph 8 and 10.

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8. Begin Text of U.S. position, delivered by George Taft:

Mr. President:

My delegation would like to thank the Secretariat for its thoughtful background paper on issues with respect to Article 4, Annex II, of the Law of the Sea Convention. I would also thank the Chairman of the Commission on the Limits of the Continental Shelf (CLCS) for his letter and the Pacific Island Forum States for their position paper.

First, we believe that there is a need for a decision of the Meeting of States Parties to clarify the date on which the 10-year period for submissions to the CLCS commences. Second, we believe, as well, that there is a broader issue regarding submissions, even after the aforementioned clarification is made.

With respect to the first issue, it was only after May 13, 1999, when the Scientific and Technical Guidelines were adopted by the Commission, that States had the information necessary to commence preparing submissions to the Commission, taking into account the Commission's expectations. In our view, this is the logical date to view the 10-year period to have begun. This date does no violence to the Convention and should assist several states, particularly developing states. Action in this regard should be taken by a decision of States Parties, for which there is precedent.

With respect to the second issue regarding submissions more generally, there are a number of factors to bear in mind in approaching this issue.

First, a continental shelf is inherent in a coastal state's sovereign territory. The fact that a state has not submitted data in relation to its shelf to the CLCS does not, and

cannot, mean that it has lost part of its shelf, but rather that it has not, in effect, a settled boundary vis--vis the Area. A state may, of course, explore and exploit its shelf beyond 200 miles, even before it makes a submission.

Second, a coastal state, which does not have resources to make a scientifically sound submission, must not be prejudiced if it fails to make a full submission within the 10-year period.

Third, in complying with the provisions of Article 4 of Annex II, a state is reasonably expected to make a submission using the best information it has available. It is recognized that a state may not have sufficient data upon which the Commission could make a recommendation. That state should nevertheless be considered to have complied with the 10-year period if it informed the Commission that it intends to make a further submission. In this regard, even generally accepted charts might be the essence of the initial submission. Good faith is essential. Putting the Commission and the international community on notice is important.

Fourth, technical issues which might result in a limited submission might include: environmental dangers and uncertainties in gathering data using traditional available methods; extreme weather conditions; unavailability of affordable technical assistance; and lack of a scientific consensus on, for example, the evaluation of certain data. In this latter regard, scientists know now much more than they knew when Article 76 was negotiated. But more will be known in the years ahead.

Fifth, the Convention was negotiated to foster stability in ocean space. Stability of expectations must be enhanced, not diminished. While no state may assert jurisdiction over the Area, no state may be deprived of a part of its continental shelf recognized by international law. If a state

over-reaches or if a state is somehow deprived, instability would result. But it should be noted that perhaps 30-40 states have a continental shelf beyond 200 miles. Therefore, realistic expectations are a necessity.

Sixth, the Commission may not prejudice boundary delimitation matters between opposite and adjacent states or matters beyond the competence of the Commission and beyond the framework of the Convention.

Mr. President, we believe that the aforementioned approach is consistent with the Law of the Sea Convention as written; it requires no amendment of the Convention; it requires no implementing Agreement. And we must be wary of any amendments to the Convention or of agreements which essentially amend the Convention. The balance of the Convention should not be buffeted or put at serious risk by actions which cannot be confined to the narrow issue before us.

Thank you. End Text.

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10. The U.S. provided a legal analysis of its position contained in the following statement delivered by Head of Delegation Maureen Walker.

Begin Text:

Mr. President, Fellow Delegates,

Thank you for the opportunity to address the Meeting of States Parties to the United Nations Convention on the Law of the Sea.

Article 319 imposes a duty on the United Nations Secretary General to convene meetings of States Parties.

Under customary international law, as reflected in the Vienna Convention on the Law of Treaties, this provision must be interpreted in accordance with the ordinary meaning of its terms in their context and in light of the Convention's object and purpose. Any subsequent agreement between the Parties regarding the interpretation of the Convention, and subsequent practice between the Parties in the application of the agreement, are also to be taken into account in its interpretation. To the extent that the terms of the provision are ambiguous, the relevant negotiating history of the provision should be considered.

The text of Article 319 provides in relevant part: "2. In addition to his functions as depositary, the Secretary General shall: (a) report to all States Parties, the Authority, and competent international organizations on

issues of a general nature that have arisen with respect to this Convention; . . . (e) convene necessary meetings of States Parties in accordance with this Convention."

The mandate to the Secretary General to convene meetings is qualified in two respects: first, it is limited to meetings that are "necessary"; second, the mandate is linked to other parts of the Convention.

Only two other areas of the Convention refer to "meetings of States Parties": (a) Annex II, which establishes the Commission on the Limits of the Continental Shelf and requires the election of its members at a meeting of States Parties; and (b) Annex VI, the Statute of the International Tribunal for the Law of the Sea, which requires the election of Tribunal members and the determination of the Tribunal's budget to be performed at a meeting of the States Parties. No other provisions of the Convention either require action by a meeting of the States Parties or acknowledge the possibility of action by a meeting of States Parties.

As a result, a strict reading of Article 319 (2) (e) suggests that this provision should not be interpreted to mandate or authorize the Secretary General to convene a far-reaching review of general matters related to the Convention.

It is also important to note that Article 319(2)(e) differs significantly from language used in other multilateral Conventions -- typically multilateral environmental agreements -- that have established autonomous institutional arrangements based on a "Conference of Parties (COP)". These agreements typically contain express language referring in varying degrees to the COP's ongoing role in overseeing the implementation and observance of the Convention. Examples include the RAMSAR Convention, Article 6 where the COP shall review and promote implementation of the Convention; CITES, Art. XI (3); Bonn Convention on Conservation of Migratory Species, Article VII (5); Basel Convention, Article 15 (5); and the Framework Convention on Climate Change, Article 7 (2). Several of these agreements predate the Law of the Sea Convention. The absence of such language in the LOS Convention indicates that the negotiators did not envision the establishment of a similar institutional arrangement here.

This reading is further supported by the context of Article 319. Paragraph 2 of Article 319 makes a clear distinction between (a) meetings of the States Parties, and (b) the issuance of a report by the Secretary General on "issues of a general nature that have risen with respect to this Convention. This context makes it clear that issues of a general nature are allocated to the Secretary General's report rather than to a Meeting of States Parties.

The subsequent practice of the Parties to the Convention lends still further weight to a narrow reading of Article 319 (2) (e).

The Meetings of States Parties have focused on duties related to the Tribunal and the Shelf Commission (which are the specified functions of the annual meetings) and have avoided expanding their agendas to address wider LOS-related questions. The issues raised during this meeting concerning the 10 year rule was primarily an organizational question related to the delay in the elections for the Commission.

At the same time, the annual meetings of the United Nations General Assembly have included since 1982 an agenda item on the law of the sea. That forum has thus performed a broad

review function regarding issues of a general nature. The recent establishment of the UN Informal Consultative Process, pursuant to an initiative of the Rio Group and SOPAC, emanating from CSD-7, is designed to allow more time for discussion of implementation and coordination of matters based on the Secretary General's report.

These practices together provide an important indication of the common and contemporaneous understanding of the Parties regarding the meaning of Article 319 and the intended scope of the meeting of States Parties.

To the extent that any ambiguity about the narrow scope of Article 319 (2)(e) remains, the negotiating history of the Convention provides a strong negative implication in support of the narrow scope referred to above.

During the negotiations, certain delegations supported various proposals that would in effect have established a mechanism for the periodic review of the Convention, including the establishment of a periodic assembly to review common problems and address new uses of the seas. These proposals all failed to attract support and were ultimately reduced to the language now appearing in Article 319 (2)(a), concerning the general reports to be made by the Secretary General. (See V United Nations Convention on the Law of the

Sea 1982: A Commentary (G. Nordquist, ed. 1989 at 289-99).

Separately, the negotiating Conference requested the Secretary General to prepare a study of his functions under the draft Convention, including under then-draft Article 319(2)(a). The Secretary General's study, submitted in 1981, makes it clear that any general review function under the Convention would be handled as part of his reporting obligation in Article 319, and that such reporting would be prepared "on the basis of systematic consultations." But it also cautions that, before any mechanisms for such consultation could be established, "further work would be needed on possible alternative methods for consulting governments . . . and ensuring better coordination on ocean space matters."

This negotiating history strongly suggests that the delegations to the negotiating conference never intended to empower the meeting of the States Parties to perform a review or even consultation function regarding general issues pertaining to the Convention or its implementation.

Thank you, Mr. President. END TEXT

11. Next Meeting. The next meeting will take place May 13-24, 2002. The election of seven judges to the International Tribunal on the Law of the Sea will occur at that time. In addition, an election for all 21 Commissioners to the Commission on the Limits of the Continental Shelf will occur.

CUNNINGHAM

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Additional Addressees:

None

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